whom it would protect seems to be a proper extension of this underlying principle in construing them.

Granted then that the parties are *in pari delicto*, the courts are agreed that where a wise regard for the public welfare is better subserved by punishment of the defendant than by a denial of relief to the complaining party, a recovery should be allowed. This principle has weight in most of the cases where the rule is waived because the parties are not equally at fault, but frequently the sole ground for granting the relief sought is that public policy demands it.[11] The clearest examples of courts being called upon to rest their decision on this ground are cases in which a *locus penitentiæ* remains. Then it best comports with the general welfare to arrest the illegal proceeding before it is consummated.[12]

It will be seen that while the general rule is that *ex dolo malo non oritur actio*, it is adhered to only in so far as it promotes the public good and the trend of the courts is to look to the reason rather than the rule, so that it is much less frequently applicable now than at the time the older cases were decided.

Summarizing, the limitations upon this doctrine fall into the following classification: (1) the parties though apparently so, are not *in pari delicto* because there is (a) fraud, oppression or undue influence on the part of the defendant, (b) a fiduciary relation exists between them, or (c) the law which makes the agreement unlawful was intended for the protection of the party asking relief. (2) The public interest would be more effectively promoted by granting relief than refusing to hear the complaint.

PROCEEDINGS IN BANKRUPTCY AGAINST DORMANT OR SECRET PARTNERS.—In cases where partnerships are being administered in bankruptcy, an anomalous condition exists by reason of the dual capacity of a member of a partnership. The administration follows peculiar rules because, while a partnership is an association of individuals by the general law, in bankruptcy for some purposes it is

[11] In Rideout *v.* Mars, 99 Miss. 199, 54 South. 801, a statute forbade any discrimination in life insurance premiums. A life insurance agent issued a policy and with agreement with the insured accepted only part of the required premium in full satisfaction. The administrator of the agent was allowed to recover of the policy holder the balance of the premium. The court said: "The general good permits the estate of the decedent to receive something he was not morally entitled to rather than the appellee shall have insurance at a less premium than the uniform rate."

[12] Taylor *v.* Bowers, L. R. 1 Q. B. 291; Mueller *v.* Cigar Co., 89 Neb. 438, 131 N. W. 923, 34 L. R. A. (N. S.) 573. So in gambling transactions the cases agree that the money may be recovered from the stakeholder before payment by him after notice not to pay, although the event upon which it was staked has occurred. Diggs *v.* Higgle, 46 L. J. Ex. 721; Moore *v.* Trippe, 20 N. J. L. 263; Fisher *v.* Hildreth, 117 Mass. 558.

considered an entity. The members are in court in two capacities, as partners and as individuals.

Only actual and not quasi-partnerships, or partnerships by estoppel, are subject to adjudication in bankruptcy.[1] Before the final settlement of firm affairs by complete distribution of assets or full payment of debts, a partnership is subject to voluntary or involuntary proceedings.[2] A partnership is solvent unless the surplus of the individual property of its several members is insufficient to pay the deficit of the partnership debts after application thereon of partnership assets.[3]

Individual members may, but need not necessarily, be joined with the partnership in the same proceedings in bankruptcy,[4] and although the firm alone is adjudicated, the estate of the individual partners are administered, even though they are not individually adjudicated bankrupt.[5] No consent of the individual member is requisite in partnership bankruptcies for the administration of either firm or individual assets,[6] the consent of the solvent partner mentioned in the Bankruptcy Act, § 5 (h), referring solely to the case where administration of firm assets is sought in the individual bankruptcy of one of the partners.

Whether or not a partnership was constituted by the Bankruptcy Act an entity, separate and distinct from the individuals who compose it, to the extent of being adjudicated bankrupt, as such, irrespective of any adjudication of bankruptcy against its individual members, was the subject of conflicting holdings[7] until the leading case of *Francis* v. *McNeal*,[8] which ratified the reasoning and conclusions of *Vacarro* v. *Bank of Memphis*[9] in holding that a partnership is not bankrupt so long as any of the members who compose it are individually solvent.

With the foregoing question authoritatively set at rest by the Supreme Court, the recent case of *Re Samuels, Appeal of Valentine* (C. C. A.), 215 Fed. 845, came before the Circuit Court of Appeals for the Second Circuit. A partnership was adjudged bankrupt as were the two known partners, but at the time of adjudication it was not known or alleged that there was another member of the partnership and he was not joined in the petition filed against the firm and his alleged copartners. Afterwards a creditor of the bankrupt firm filed a petition in the bankruptcy court alleging that another person, Valentine, was a dormant or secret partner and prayed for an order directing him "to file a schedule of his debts and an in-

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[1] Re Beckwith, 130 Fed. 475, reversed by Jones *v.* Burnham, etc., Co., 138 Fed. 986, 15 Am. B. R. 85, on the facts but not on law.

[2] B. A., § 5(a).

[3] Re Forbes, 128 Fed. 137, 11 Am. B. R. 787.

[4] Re Grant Bros., 106 Fed. 496, 5 Am. B. R. 837.

[5] B. A., § 6(c); Re Meyer (C. C. A.), 98 Fed. 976. See Re Farley, 115 Fed. 359.

[6] B. A., § 5(h); Re Pierce, 102 Fed. 977, 4 Am. B. R. 489.

[7] *Pro*, Vaccaro *v.* Bank of Memphis (C. C. A.), 103 Fed. 436. *Contra*, Re Bertenshaw (C. C. A.), 157 Fed. 363.

[8] 228 U. S. 695.

[9] *Supra.*

ventory of his property in the same manner as is required in cases of debtors against whom adjudication of bankruptcy has been made." Thereupon Valentine, with the reservation that he did not acknowledge the jurisdiction of the court over him, answered under oath denying the copartnership and asserting his solvency. Nevertheless the district court granted the order as prayed, upon the erroneous theory that the partnership was for all purposes in bankruptcy an entity and the only question open was whether or not Valentine was in fact a partner at the time of the petition, and upon this issue he was denied a jury trial as a matter of right on the ground that, although the court administers his estate, it does not declare him a bankrupt and need not even find him insolvent. The only recourse to escape administration would be to pay off the firm creditors.[10]

The Circuit Court of Appeals reversed the decree. No valid petition for adjudication had been filed against Valentine. The petition of the creditor cannot be upheld under § 59 (b) (d) because it did not ask to have him adjudged a bankrupt, it did not assert that he was insolvent, and it did not allege facts which are sufficient to justify a single creditor in filing the petition. The petition cannot be sustained under § 21 because that section provides merely for examination concerning the acts, conduct, or property of the bankrupt, and was designed to provide a searching and summary method for the discovery of hidden assets. When no petition in bankruptcy has been filed against him, an individual who asserts under oath that he is not a partner cannot be summarily adjudicated a partner in an inquiry before a referee to which he does not consent. Section 19 (a) gives the debtor the absolute right to have the issues as to his insolvency and as to his having committed an act of bankruptcy determined by a jury.[11] He cannot be bound by proceedings to which he was not a party wherein a partnership is adjudicated bankrupt because a partnership is not an entity to such an extent that proceedings against it and the ostensible partners will bind secret or dormant partners not actually joined in the petition.[12]

A bankruptcy court in proceedings against a partnership has no jurisdiction to administer the estate of an alleged secret or dormant partner without his consent unless it declares him bankrupt or finds him insolvent in the manner and form provided by the Bankruptcy Act.

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[10] Re Samuels, 207 Fed. 195, 30 Am. B. R. 293.
[11] Re Forbes, *supra*.
[12] See Francis *v.* McNeal, *supra*.